No. 18-443

IN THE
SUPREME COURT OF THE UNITED STATES

BOBBY JAMES MOORE,
PETITIONER,
V.
TEXAS,
RESPONDENT,

On Petition For a Writ of Certiorari
To the Court of Criminal Appeals of Texas

BRIEF IN OPPOSITION

Kim Ogg
DISTRICT ATTORNEY
HARRIS CO., TEXAS

Scott Durfee
General Counsel
Counsel of Record
500 Jefferson, Suite 600
Houston, TX 77002
(713) 274-5800
durfee_scott@dao.hctx.net

CAPITAL CASE

QUESTION PRESENTED

Whether the Texas Court of Criminal Appeals erred in its legal conclusion that the petitioner, Bobby James Moore, is not intellectually disabled.

TABLE OF CONTENTS

QUESTION PRESENTED.....i

WHETHER THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN ITS LEGAL CONCLUSION THAT THE PETITIONER, BOBBY JAMES MOORE, IS NOT INTELLECTUALLY DISABLED.

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....2

REASONS TO GRANT THE PETITION.....6

THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN ITS LEGAL CONCLUSION THAT THE PETITIONER IS NOT INTELLECTUALLY DISABLED.

CONCLUSION..... 10

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia,
536 U.S. 304 (2002).....*passim*

Ex Parte Briseno,
135 S.W.3d 1 (Tex.Crim.App. 2004).....4, 5

Ex Parte Moore,
470 S.W.3d 481 (Tex.Crim.App. 2015).....4, 6

Moore v. State,
700 S.W.2d 193 (Tex.Crim.App. 1985).....2

Moore v. State,
No. AP-74,059, slip. op., 2004 WL 231323
(Tex.Crim.App. Jan. 14, 2004)
(not designated for publication).....2

Moore v. Texas,
137 S.Ct. 1039 (2017).....*passim*

STATUTES

28 U.S.C. §1257(a).....1

TEX. CRIM. PROC. CODE art. 11.071 § 11.....4

OTHER AUTHORITIES

American Association on Intellectual and Developmental Disabilities, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (11TH ed. 2010).....3

American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000).....3

American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).....*passim*

OPINIONS BELOW

Citations to the official and unofficial reports of the opinions below are adequately set forth in the petition for writ of certiorari, as well as in the appendix thereto.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are adequately set forth in the petition for writ of certiorari.

STATEMENT OF THE CASE

In 1980, the petitioner, Bobby James Moore, was convicted of capital murder and sentenced to death. *Moore v. State*, 700 S.W.2d 193, 195 (Tex. Crim. App. 1985). In 2001, following a grant of federal habeas corpus relief, the petitioner was again convicted of capital murder and sentenced to death. *Moore v. State*, No. AP-74,059, slip. op., 2004 WL 231323, *1 (Tex. Crim. App. Jan. 14 2004) (not designated for publication).

Following his 2001 retrial, the petitioner filed a state writ of habeas corpus alleging that he is intellectually disabled and thus ineligible to be executed under *Atkins v. Virginia*, 536 U.S. 304, 311-21 (2002). The trial court agreed. Petitioner's Appendix 235a-311a.

On February 6, 2015, the state habeas court entered "Addendum Findings of Fact and Conclu-

sions of Law on Claims 1-3." Petitioner's Appendix 235a-311a. Utilizing the diagnostic criteria set forth in the American Association on Intellectual and Developmental Disabilities' INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (AAIDD, 11TH ed. 2010) ("AAIDD-11") and the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (APA, 4TH ed. 2000) ("DSM-IV-TR") and (APA, 5TH ed. 2013) (DSM-5"), the state habeas court held that the petitioner met the clinical definition of intellectual disability. Petitioner's Appendix 310a. The state habeas court also held that the petitioner had established that he was intellectually disabled under the "prevailing legal standards per *Atkins v. Virginia*, 536 U.S. 304 (2002)." Petitioner's Appendix 310a.

The state habeas court's findings of fact and conclusions of law were then reviewed by the Texas Court of Criminal Appeals ("TCCA"). See TEX. CRIM. PROC. CODE art. 11.071, §11. Applying the test it set forth in *Ex Parte Briseno*, 135 S.W. 3d 1, 4-8 (Tex. Crim. App. 2004), the TCCA determined that the petitioner did not meet his burden of proving that he is intellectually disabled. *Ex Parte Moore*, 470 S.W. 3d 481, 514-28 (Tex. Crim. App. 2015). Petitioner's Appendix 109a-234a.

The United States Supreme Court vacated and remanded, concluding that *Briseno* was based on superseded medical standards, the application of which created an "unacceptable risk" that a person with intellectual disabilities will be executed in violation of the Eighth Amendment. *Moore v. Texas*, 137 S. Ct. 1039, 1048-53 (2017).

On remand before the TCCA, the petitioner argued that this Court determined he satisfied the diagnostic criteria for intellectual disability. The petitioner did not urge the TCCA to adopt either the AAIDD-11 or the DSM-5.

In its briefing to the TCCA, the respondent urged the TCCA to adopt the DSM-5 as the diagnostic criteria to replace *Briseno*. The respondent also urged the TCCA to conclude that the petitioner is intellectually disabled. The TCCA acknowledged the same. Petitioner's Appendix 3a.

In its Opinion of June 6, 2018, the TCCA exercised its prerogative under *Moore v. Texas*, supra, and adopted the DSM-5 approach for determining intellectual disability. Petitioner's Appendix 11a-15a.

The TCCA also found that the petitioner failed to meet his burden of proving adaptive deficits

sufficient to support a diagnosis of intellectual disability. Petitioner's Appendix 39a. The TCCA denied relief, thus making the petitioner eligible for execution. *Id.*

REASONS TO GRANT THE PETITION

THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN ITS LEGAL CONCLUSION THAT THE PETITIONER IS NOT INTELLECTUALLY DISABLED.

The petitioner's capital murder of James McCarble was brutal. The punishment for his heinous act should be lengthy and constitutional.

The respondent agrees with the TCCA's determination that the DSM-5 is the preferred diagnostic criteria to assess the petitioner's claim for *Atkins* relief. *Ex Parte Moore*, 548 S.W.3d at 560. This holding is consistent with this Court's opinion in

Moore v. Texas that *Atkins* claims must be evaluated by "prevailing clinical standards." 137 S.Ct. at 1050.

However, the respondent parts company with the TCCA in its determination that the applicant is not intellectually disabled. Two aspects of the TCCA's opinion are problematic.

First, notwithstanding this Court's holding in *Moore v. Texas* that the TCCA placed an overreliance upon the petitioner's improved behavior in prison, the TCCA continued this errant analysis on remand. Indeed, in analyzing the petitioner's math and money skills, the TCCA focused almost entirely upon the petitioner's prison commissary account. Petitioner's Appendix 25a-31a.

Second, the clear import of this Court's analysis and holding (like the state habeas court) in *Moore v. Texas* is that it believes that the petitioner is intellectually disabled. As this Court noted in *Moore*:

In 2014, the state habeas court conducted a two-day hearing on whether Moore was intellectually disabled. The court received affidavits and heard testimony from Moore's family members, former counsel, and a number of court-appointed mental-health experts. The evidence revealed that Moore had significant mental and social difficulties beginning at an early age. At 13, Moore lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition. At school, because of his limited ability to read and write, Moore could not keep up with lessons. Often, he was separated from the rest of the class and told to draw pictures. Moore's father, teachers, and peers called him "stupid" for his slow reading and speech. After failing every subject in the ninth grade, Moore dropped out of high school. Cast out of his home, he survived on the streets, eating from trash cans, even after two bouts of food poisoning.

. . .

Moore's IQ scores, the habeas court determined, established subaverage intellectual functioning. The court credited six of Moore's IQ scores, the average of which (70.66) indicated mild intellectual disability. And relying on testimony

> from several mental-health experts, the habeas court found significant adaptive deficits. In determining the significance of adaptive deficits, clinicians look to whether an individual's adaptive performance falls two or more standard deviations below the mean in any of the three adaptive skill sets (conceptual, social, and practical). Moore's performance fell roughly two standard deviations below the mean in all three skill categories.

137 S. Ct. at 1045-46 (internal citations omitted).

For these reasons, the State of Texas, by and through the Harris County District Attorney's Office, agrees with the petitioner that he is intellectually disabled and cannot be executed. Accordingly, the petitioner is entitled to a summary reversal of the TCCA's June 8, 2018 opinion.

CONCLUSION

For the foregoing reasons, the Court should summarily reverse the opinion of the Texas Court of Criminal Appeals of June 6, 2018.

Respectfully submitted,

Kim Ogg
DISTRICT ATTORNEY
HARRIS CO., TEXAS

Scott Durfee
General Counsel
Counsel of Record
500 Jefferson, Suite 600
Houston, TX 77002
713-274-5800
durfee_scott@dao.hctx.net

Counsel for the respondent